DOCUMENT RESUME

ED 268 662 EA 018 389

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TITLE Prayer in Public School Graduation Ceremonies.
INSTITUTION National Association of Secondary School Principals, Reston, Va.
PUB DATE Apr 86
NOTE 10p.
AVAILABLE FROM Publication Sales, National Association of Secondary School Principals, 1904 Association Drive, Reston, VA 22091 ($1.00 prepaid; quantity discounts).
PUB TYPE Collected Works - Serials (022) -- Information Analyses (070) -- Guides - Non-Classroom Use (055)
JOURNAL CIT Legal Memorandum; Apr 1986

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Commencement Ceremonies; Constitutional Law; *Court Litigation; *Graduation; High Schools; High School Seniors; *Religion; School Law
IDENTIFIERS *Establishment Clause; *Prayer; Supreme Court

ABSTRACT

Questions arise about the constitutionality of including some form of prayer, usually an invocation or benediction, in public school graduation ceremonies, and whether such prayer can appropriately be delivered by a minister or other religious leader. The U. S. Supreme Court has not addressed this precise issue, but an analysis of other courts' decisions, and related Supreme Court precedents, may help educators to assess the factors involved in assessing the constitutionality of this widespread practice. Arguments against prayer at graduation ceremonies are based on the Establishment Clause of the First Amendment that reads: "Congress shall make no law respecting an establishment of religion...." An examination of the cases cited indicates that the outcome of a commencement exercise challenge appears to hinge on the evidence of school district involvement designed to advance religious purposes. Without aggravating circumstances, a court would seem to be unlikely to find an Establishment Clause violation in the context of the traditional ceremonial nature of commencement exercises. (Thirty-two references) (MLF)

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ED268662

A Legal Memorandum

APRIL 1986 National Association of Secondary School Principals ISSN 0192-6152

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PRAYER IN PUBLIC SCHOOL GRADUATION CEREMONIES

Each spring as graduation nears and plans are made for the ceremony, questions arise in public high schools about the constitutionality of including some form of prayer, usually an invocation or benediction, and whether such prayer can appropriately be delivered by a minister or other religious leader. Until recently, court decisions on this troublesome issue were rare and school attorneys, as well as educators were forced to speculate on what the result might be were a legal challenge to be made to the inclusion of such activities in the graduation ceremonies of any particular school.

In 1985, two federal district courts addressed this issue. In the case of Graham v. Central Community S. D. of Decatur County,[1] the federal district court in Iowa ruled that the practice would violate the Establishment Clause of the U.S. Constitution.* In contrast, however, in the case of Stein v. Plainwell Community Schools,[2] a federal district court in Michigan upheld the constitutionality of the practice. The U. S. Supreme Court has not addressed this precise issue. Until it does, we will still have no clear answer to the question, but an analysis of these cases may help educators to assess the factors involved in assessing the constitutionality of this widespread practice.

Related Supreme Court Precedents

In 1971, in Lemon v. Kurtzman[3] the Supreme Court analyzed statutes providing for publicly financed aid to parochial schools. In so doing it formulated a three-part test that has been consistently applied as the fundamental tool in analyzing the Establishment Clause: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster 'an excessive government entanglement with religion.'"[4]

Even earlier, the Supreme Court had considered several cases concerning Establishment Clause challenges to practices that bring prayer or religion into America's public schools. In 1962, in Engle v. Vitale,[5] the Court considered a prayer prepared by the N.Y. State Board of Regents and ordered

*The so-called Establishment Clause of the First Amendment reads in pertinent part: "Congress shall make no law respecting an establishment of religion..."

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it to be said aloud by each class in the presence of a teacher at the start of each school day. The prayer was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." The Court found that the prayer violated the Establishment Clause.

The following year, in Abington School District v. Schempp,[6] the Court struck down a Pennsylvania statute that required that "At least 10 verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

In the consolidated companion case from Maryland (Murray v. Curlett), decided at the same time, the Court held invalid a "rule" authorized by Maryland law, that provided for "reading, without comment, of a chapter in the Holy Bible and/or the use of The Lord's Prayer." The Court found that the prescribed exercise of Bible reading and recitation of the Lord's Prayer were part of the curricular activities of students who are required by law to attend school. They were held in the school building under the supervision and with the participation of teachers employed in those schools. The Court found that the opening exercise was "a religious ceremony" that violated the Establishment Clause.

In 1980, in Stone v. Graham,[7] the Supreme Court invalidated a state statute requiring the posting of the Ten Commandments on public classroom walls. And on June 4, 1985, in Wallace v. Jaffree,[8] the Supreme Court held that an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer was an endorsement of religion lacking any clearly secular purpose, and thus was in violation of the First Amendment.

While the High Court has never specifically addressed the issue of prayers at commencement exercises, in two recent cases it has allowed practices to stand which were challenged as violations of the Establishment Clause. In Marsh v. Chambers,[9] the Court upheld the Nebraska legislature's practice of beginning each of its sessions with a prayer by a chaplain paid by the state. In reaching this conclusion, the Court relied on the unique history of legislative prayer:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of the country.[10]

Marsh is the only Establishment Clause decision since 1971 in which the Court has not applied the three-pronged Lemon test.

In Lynch v. Donnelly,[11] the Court was asked to consider whether the inclusion of a nativity scene in the annual Pawtucket, R.I., Christmas display

in a park owned by a nonprofit organization and located in the heart of the city's shopping district, violated the Establishment Clause. The display also included a Santa Claus house, a Christmas tree, a wishing well, and a banner that read "SEASONS GREETINGS." The creche had been part of the display for more than 40 years. Applying the Lemon test, the Court found that in the context of the Christmas season the creche passed all three parts of the test, because it was viewed as a passive symbol, and no more an advancement or endorsement of religion than the exhibition of religious paintings in governmentally supported museums.

Prayer at Commencements Upheld

In the 1970s two federal district courts and the Pennsylvania Supreme Court upheld the practice of offering invocations and benedictions at commencement exercises. In 1972, the federal district court dismissed a complaint charging that the Mt. Lebanon, Pa., School District's practice of including an invocation and benediction at the high school graduation ceremonies violated the Establishment Clause.[12] The court considered the assertion that the graduation ceremony was not compulsory "strips the function of any semblance of governmental establishment or even condonation."[13]

The court found the prayers to be "ceremonial" and not a part of the formal, day-to-day routine of the school curriculum. The court found "such customary remarks are commonplace in our society."[14]

One year later, 10 days before graduation, at a public meeting of the Mt. Lebanon School Board, the board unanimously adopted a commencement program that provided for "an audible invocation and benediction" to be delivered by a clergyman. Graduating seniors again attacked the 60-year-old district practice. This time, suit was brought in state court, and the plaintiffs also alleged that the practice violated the Pennsylvania constitution. In 1974 the Supreme Court of Pennsylvania upheld the lower court's dismissal, finding no violation of the Establishment Clause or the state constitution.[15]

The same year, graduating seniors at the Douglas Freeman High School in Henrico County, Va., sought to enjoin the school board from including an invocation and benediction as part of the commencement exercises. The decision to have the invocation, which customarily consists of a short, audible prayer, was made by the senior class acting through its class representatives. The plaintiffs requested that an audible prayer not be delivered at the graduation ceremony, but the school board refused to institute the prohibition. The court considered the question "a close one, made especially so because the precise nature of the contemplated portions of the program under attack are unknown at this stage of the proceedings."[16] However, the court upheld the practice finding that the primary purpose of the occasion was ceremonial, and that any effect of advancing religion was indirect and incidental.

Stein v. Plainwell Community Schools[17] was consolidated from two Michigan school districts where parents of students in the 1985 graduating classes sought to prevent the inclusion of invocations and benedictions in their graduation ceremonies. In both cases, the plaintiffs contended that prayers in a graduation ceremony violate the Establishment Clause.

The Plainwell Community School District planned to hold its annual high school commencement on June 6, 1985, at an outdoor athletic facility. Attendance by graduating seniors was voluntary, and receipt of diplomas was not conditioned on attendance. Plainwell had included invocations and benedictions as a regular part of commencement exercises for many years. Since 1980, the general practice had been to have one graduating senior offer an invocation and a different senior offer the benediction. The students were volunteers chosen from the group of honor students who auditioned, but were not selected, to give the two commencement addresses. The students were advised to keep the invocation and benediction brief. Before the commencement, they were required to practice before the school's speech instructor, but the administration in no way attempted to monitor the content of their presentations.

The second Michigan challenge arose in the Portage Public School District. The board planned to hold its commencement exercises in the football stadium May 31, 1985. As with the Plainwell graduation, attendance was voluntary and receipt of a diploma was not conditioned on attendance. For the past 15 years, the Portage district had permitted the graduating seniors to organize and develop the content of their commencement exercises. Each graduation ceremony had included an invocation and a benediction delivered by a minister selected by representatives of the graduating class. The invocation and benediction accounted for approximately 3 minutes during a 75 minute ceremony. Neither the school administrators nor the senior class representatives previewed the content of the minister's presentation. The minister was instructed, however, to keep the invocation and benediction nondenominational and short.

The United States District Court, Western Division of Michigan, said that the facts in these cases fell into a grey area of the law. It pointed out that on the one hand, the Supreme Court has ruled the recitation of nondenominational prayers and the daily reading of the Bible in public school classrooms to be barred by the Establishment Clause.[18] On the other hand, the Court has also held that the Nebraska State legislature's practice of opening each day with a prayer by a state-paid chaplain does not violate the Establishment Clause.[19]

The Michigan federal district court distinguished the cases before it from Engle because the commencement exercises were not a daily routine that took place in the classroom. Similarly, while the graduation ceremonies incorporated opening prayers as in Marsh, they did not present the legislative setting that was critical to the Court's decision to uphold the practice in Marsh. The court applied the three-part Lemon test, noting that the issue must be decided in the context in which it arose. The court said the prayers at both schools were not "inherently religious." Although the minister at the Portage High School commencement saw the prayer as religious, many persons present saw it as merely a formal way of opening and closing the graduation ceremony. Thus:

> The Court recognizes a dual nature of prayer in this context, partly religious and partly ceremonial.... Given the dual nature of the kind of prayer at issue in this case, the Court must not be misled by looking solely at the purpose of the person who is delivering the prayer. Even if the purpose of the speaker is purely religious, the practice may still be constitutional if the purpose of the sponsoring governmental body is primarily secular.[20]

The court found at least two secular purposes for the practice. First, the school must provide some form of solemn opening and closing for the graduation ceremony. An invocation and benediction have traditionally served in this role. "The fact that they chose an opening and closing form from the Christian tradition is not itself reason to prohibit the practice."[21] Second, the schools have the purpose of permitting the students to either plan or participate in their own commencement exercises. Finding no evidence of a purpose to proselytize the audience to accept the tenets of any faith, the court ruled that the purpose of the prayers was primarily secular.

The court determined that the principal or primary effect of the prayers was not to advance or inhibit religion. Finally, the court found that the challenged once-a-year practice did not foster excessive governmental entanglement with religion. The court concluded that the plans for graduation ceremonies in the two high schools did not violate the Establishment Clause.

Prayer at Commencement Struck Down

Less than two months after the federal court in Michigan upheld the graduation ceremonies in Stein, the United States District Court for the Southern District of Iowa ruled in Graham v. Central Community School District of Decatur County[22] that an Iowa school district's commencement practices violated the Establishment Clause.

For at least the past 20 years, and probably much longer, the Central Community School District of Decatur County, Iowa, had opened its graduation ceremonies with an invocation prayer by a Christian minister and closed with a Christian minister's benediction. The invocation was usually no more than two or three minutes long, and the benediction was usually less than one minute. The entire commencement exercise lasted from 60 to 90 minutes. The minister, who was selected by the president of the Community Ministerial Alliance, was not paid for the services. Attendance at the graduation ceremony had always been voluntary, and seniors were not required to attend to receive a diploma.

In early 1984, Robert Graham, the father of a student at Central Decatur High School, appeared before the school board to object to the religious content of the proposed 1984 graduation ceremonies. The Grahams are Unitarian-Universalists and claimed that they were personally offended by the offering of Christian prayers at public school functions.

At a subsequent meeting, the school board voted to cease conducting its baccalaureate service and to grant the Community Ministerial Alliance's request that the Ministerial Alliance conduct a separate, voluntary baccalaureate service. However, the school board also decided not to change its practice of having an invocation and benediction conducted by a minister at the commencement ceremonies. At the conclusion of the board meeting, the president of the school board remarked in the presence of Mrs. Graham and all others present that she hoped the Graham children could be exposed to Christianity in school.

On March 5, 1985, the Iowa Civil Liberties Union demanded that the school board abandon its practice of offering invocations and benedictions at graduation. The board rejected that demand. The Grahams filed suit under Title 42 U.S.C. Sec. 1983, seeking a declaratory judgment that the practice of including an invocation and benediction at the ceremonies violated the Establishment Clause of the First Amendment.

In addition to their own testimony, the Grahams offered the testimony of three expert witnesses. One was a United Methodist clergyman; one was an ordained minister of the Christian Church (Disciples of Christ) who served as a professor of religion at Drake University; and the other was an ordained Unitarian-Universalist minister. All three ministers expressed the opinion that invocations and benedictions at commencement exercises served a religious rather than a secular purpose, and that a public school offering an invocation and benediction at public events, such as commencement exercises, was advocating religion.

The minister selected to conduct the 1985 invocation and benediction was the Reverend Richard Speight, Jr., an ordained United Methodist minister. The Reverend Speight considered the purpose of the invocation and benediction that he planned to give to be solely religious; that the practice served traditional values of a community founded on Judeo-Christian tradition in which the graduating seniors grew up; and that the practice was "in the tradition of the One who is my Lord and Savior, Jesus Christ."[23]

Superintendent Thomas Spear testified that the primary purpose of the practice was "tradition"[24] which gave to the ceremony a "serious note." He acknowledged that the prayers also served a religious purpose. He conceded that commencement exercises might be started off on a "serious note" by some means other than prayer, but that an invocation was the only means with which he was familiar.

The court concluded that the commencement exercises "serve a Christian religious purpose, not a secular purpose. This finding and conclusion is supported not only by the great weight of the evidence, but by the undeniable truth that prayer is inherently religious."[25] The court also found that the invocation and benediction portions of the commencement exercise had as their primary effect the advancement of the Christian religion.

The court did not rule on the "excessive entanglement" prong of the Lemon test, as the plaintiffs did not raise it. The court's resolution of the other two parts of the test was dispositive of the case, however, and it enjoined the district from including religious invocations and benedictions at commencement.

The court found no merit in the school district's claim that an injunction would infringe on the free exercise rights of others. "The First Amendment right of the people to the free exercise of religion does not give them a right to have government provide them public prayer at government functions and ceremonies, even if the majority would like it."[26]

Conclusions

The outcome of a commencement exercise challenge would appear to hinge on the evidence of school district involvement designed to advance religious purposes. In the Graham[27] case, the president of the school board made public, coercive statements to the effect that she hoped the Graham children could be exposed to Christianity in school.

The Community Ministerial Alliance sought to advance a single creed. The Graham children experienced the kind of exclusion and ostracism that the

Establishment Clause was designed to prevent. The district never even alleged any secular purpose for the prayers. These facts were sufficient proof of an Establishment Clause violation.

Several factors have little or no relevance in the outcome of these cases. Whether the court views invocations and benedictions as "inherently religious"[28] or as a "vapid ritualistic exercise to promote dignity and solemnity"[29] is not determinative. The voluntariness of the ceremony is not dispositive, because the social significance of the event belies a truly voluntary nature. Whether the commencement exercises are held on or off school premises is also not controlling. And it does not matter whether the school board or the students make the decision to include an invocation and benediction.

In all cases that have upheld the inclusion of invocations and benedictions at commencement exercises, the courts have distinguished the school prayer cases, finding that:

> [t]here is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination. The overall program of which the invocation will be a part is neither educational nor religious, but ceremonial, and the total length of the invocation has been estimated as only a few minutes. Such an occasion with such an invocation has not occurred previously before this audience and it will not occur again. The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated. There is no state financial outlay and the Court cannot visualize the organs of state government becoming infected by a divisive religious battle for control of this brief and transient exercise. Government here is not "embroiled" in religious matters.[30]

As the Supreme Court recently explained in Lynch:

> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith--as an absolutist approach would dictate-- the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.[31]

The Lynch court focused its inquiry on the creche in the context of the Christmas season. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."[32] Likewise, the focus of our inquiry must be on the invocation and benediction in the context of commencement exercises. Without aggravating circumstances, as in the Graham case, a court would seem to be unlikely to find an Establishment Clause violation in the context of the traditional ceremonial nature of commencement exercises.

ENDNOTES

1. 608 F. Supp. 531, 25 Ed. Law 262 (D.C. Iowa 1985).
2. 610 F. Supp. 43, 25 Ed. Law 1149 (W.D. Mich. 1985).
3. 403 U.S. 602, 91 S. Ct. 2105 (1971).
4. Id. at 612-13, 91 S. Ct. at 2111.
5. 370 U.S. 421, 82 S. Ct. 1261 (1962).
6. 374 U.S. 203, 83 S. Ct. 1560 (1963).
7. 449 U.S. 39, 101 S. Ct. 192 (1980).
8. ___ U.S. ___, 105 S. Ct. 2479, 25 Ed. Law 39 (1985).
9. ___ U.S. ___, 103 S. Ct. 3330 (1983).
10. Id. at 3336.
11. ___ U.S. ___, 104 S. Ct. 1355 (1984).
12. Wood v. Mt. Lebanon School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972).
13. Id. at 1295
14. Id.
15. Wiest v. Mount Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).
16. Grossberg v. Deusebio, 380 F. Supp. 285, 290 (E.D. Va. 1974).
17. 610 F. Supp. 43, 25 Ed Law 1149 (W.D. Mich. 1985).
18. Engle v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962); Abington School Dist. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963). See supra notes 5 + 6 and accompanying text.
19. Marsh v. Chambers, 103 S. Ct. 3330 (1983). See supra note 9 and accompanying text.
20. 610 F. Supp. 43, 47 (W.D. Mich. 1985) (emphasis in original; footnote omitted).
21. Id at 48.
22. 608 F. Supp. 531 (S.D. Iowa 1985).
23. Id. at 533.
24. Id. at 534.
25. Id. at 535.
26. Id. at 537. The court noted:
    Similar holdings in respect to graduation ceremonies have been reached by two state trial courts in unpublished opinions brought to the attention of this court.... They are Kay v. David Douglas S. D. No. 40, No. A8404-02438, Circuit Court for the State of Oregon for the County of Multnomah, judgment entered June 28, 1984, and Bennett v. Livermore Valley Unified S. D. No. H-91312-6, Superior Court of the State of California in and for the County of Alameda, memorandum of decision, May 17, 1984. Id.
27. See supra note 22 and accompanying text.
28. Graham, supra note 22 at 535.
29. Wiest, supra note 15 at 370 (Pomeroy, J., concurring).
30. Grossberg v. Deusebio, 380 F. Supp. 285, 288-89 (E.D. Va. 1974). See supra note 16 and accompanying text.
31. 104 S. Ct. 1355 at 1361 (citations omitted; emphasis added).
32. Id. at 1362.

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A Legal Memorandum is a publication of the National Association of Secondary School Principals, 1904 Association Dr., Reston, Va. 22091. Annual subscription rate of $4 is included in the NASSP dues. Additional copies may be ordered: single copies, $1 each; 2-10 copies, 85 cents each; 11-99 copies, 75 cents each; 100 or more copies, 60 cents each. Individual subscriptions are not available.

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